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No. 88-885

In The
Supreme Court of the United States
October Term, 1988

FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

versus

MICHAEL LYNN RICHARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the district judge was entitled to find the jury's answers to interrogatories inconsistent and retire the jury for further deliberations?

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Respondent, Michael Lynn Richard, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by The Firestone Tire & Rubber Company.

STATEMENT OF THE CASE

Plaintiff, Michael Lynn Richard, instituted this action against The Firestone Tire & Rubber Company to recover for serious injuries received when a multi-piece truck/tire rim assembly exploded under pressure. The multi-piece rim was designed and manufactured by defendant. Hardesty Tire Service, who paid workmen's compensation benefits, intervened.

At the conclusion of the trial, this matter was submitted to the jury on special interrogatories. The jury originally returned answers finding that the Firestone multi-piece rim was defective, that Firestone had failed to warn adequately of the dangers of the product and that Firestone was 10% at fault, but the jury found no causation (Petitioner's Appendix D, A-26 to A-29). The trial judge retired the jury for further deliberations due to the inconsistency between a finding that Firestone was partly at fault and finding no causation (Petitioner's Appendix F, A-38 to A-44). After further deliberations, the jury returned a verdict finding both plaintiff and defendant partly at fault and that such fault caused Michael Richard's injuries (Petitioner's Appendix E, A-30 to A-33).

The Fifth Circuit held that Fed.R.Civ.P. 49(a) allows resubmission of inconsistent special verdicts, and that the district judge did not err in determining that the jury answers were inconsistent and resubmitting the case to the jury. Firestone's application for rehearing was denied and the instant petition for certiorari was lodged with this Court.

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SUMMARY OF ARGUMENT

The district judge did not err in concluding that the jury answers to special interrogatories were inconsistent by resubmitting the interrogatories to the jury for further deliberations.

ARGUMENT

The decision by the judge to retire the jury for further deliberations after it reached an inconsistent verdict did not infringe upon Firestone's right to trial by jury and was not contrary to prior decisions of the Supreme Court. Furthermore, the decision of the Fifth Circuit in this case does not conflict with decisions of other circuits, so there is no need to grant the writ in order to reconcile conflicting circuit decisions.

A. THE COURT OF APPEALS DECISION DOES NOT INFRINGE ON FIRESTONE'S RIGHT TO TRIAL BY JURY AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THE SUPREME COURT

The most important fact to consider in this case is that it was the jury, not the trial judge, which cured the inconsistency of the verdict through further deliberations. Firestone apparently believes that once the jury returned its initial inconsistent verdict, the trial judge should have found a way to reconcile the inconsistent verdict and should have directed a verdict in favor of Firestone. However, the trial judge could have just as easily reconciled the inconsistent verdict by finding in favor of Michael

Richard, since the jury found that the product was defective and apportioned Firestone's fault at 10%. In this hypothetical situation, regardless of which way the trial judge directed a verdict, the losing party would have asked the appellate court to reconcile the jury's verdict and the appellate court would then have had a duty to reconcile the verdict or remand the case for retrial. By advising the jury that the verdict, as written, was not in proper form, the trial judge relieved the appellate courts from the responsibility of reconciling the verdict and placed the responsibility of deciding the case where it belongs, in the hands of the jury. Since the jury made the decision, it is difficult to understand how Firestone can argue that it was deprived of its right to a jury trial. It would seem that if the judge had directed a verdict in favor of either party without requiring the jury to retire for further deliberation, the Seventh Amendment argument might have more substance.

In support of its argument Firestone relies heavily on cases which present an entirely different fact pattern, specifically with one critical difference. The cited cases speak of the obligation of the trial court to reconcile inconsistent verdicts *after the jury has been discharged.* When a jury which is *still empaneled* returns an inconsistent verdict ,the courts have uniformly allowed the trial court to resubmit the same or additional interrogatories, not only in cases of clear inconsistencies, but in cases of ambiguities as well. *Morrison v. Frito-Lay, Inc.*, 546 F.2d 154 (5th Cir. 1977); *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Guidry v. Kem Mfg. Co.*, 604 F.2d 320 (5th Cir. 1979), cert. den. 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980).

The position that a trial court has the authority to resubmit ambiguous or unclear interrogatories to the jury for clarification is consistent with the spirit and the letter of the Seventh Amendment. When a jury is no longer available to clarify ambiguities, it cannot be questioned that the trial court and the appellate court should make every effort to ascertain the jury's true intent. However, when a jury is still available to clarify an ambiguity, the court should resubmit the interrogatories so that the true finding of the jury is obtained. This view is clearly consistent with, if not mandated, by the Seventh Amendment.

In *McLaughlin v. Fellows Gear Shaper Co.*, 786 F.2d 592 (3d Cir. 1986), the jury returned special interrogatories which were inconsistent. The court submitted additional interrogatories over objections of both counsel and the jury later returned a verdict for the plaintiff. On appeal the defense asserted that the district court was mandated by the Seventh Amendment to reconcile the inconsistencies. The Third Circuit held that there could be no Seventh Amendment violation when it was the jury rather than the trial judge which reconciled the inconsistencies.

The Fifth Circuit has consistently allowed resubmission of inconsistent jury verdicts. *Nance v. Gulf Oil Corp.*, supra; *Guidry v. Kem Mfg. Co.*, supra; *Morrison v. Frito-Lay, Inc.*, supra; *Griffin v. Matherne*, 471 F.2d 911 (5th Cir. 1973); *Landry v. Offshore Logistics, Inc.*, 544 F.2d 757 (5th Cir. 1977). Inherent in the concept of resubmission is that the court must find the true, unequivocal intent of the jury.

Firestone's reliance on *White v. Grinfas*, 809 F.2d 1157 (5th Cir. 1987), is difficult to understand. In that case the Fifth Circuit merely recognized the broad discretion of the trial court to refuse to consider interrogatories answered in violation of the judge's instructions. The *White* case certainly does not stand for the proposition that the trial court is prohibited from allowing a jury to engage in additional deliberations in order to correct an inconsistent verdict. The Fifth Circuit was not faced with that issue because the trial court did not resubmit the verdict to the jury.

Perricone v. Kansas City Southern Rwy., 704 F.2d 1376 (5th Cir. 1983), likewise does not support Firestone's contention. If anything, it supports that of Mr. Richard. In that case the jury returned a *consistent* verdict which found the plaintiff to be 70% at fault. The trial judge then told the jury that he had forgotten to instruct them that if they attributed more than 50% of the fault to the plaintiff, he could not recover. He then ordered them to reconsider their verdict. Naturally, the Fifth Circuit was troubled by the actions of the trial judge because of the potential coercion or undue influence. The same potential for coercion does not exist in the case at bar because the trial judge did not even remotely suggest what the effect of the jury's answer would be. The court merely instructed the jury to read the directions which were already on the printed jury verdict form. The trial judge recognized that the jury was in the best position to cure the inconsistency and exercised his discretion by resubmitting the interrogatories to the jury.

Finally, Rule 49 of the Federal Rules of Civil Procedure allows the trial court to resubmit interrogatories to the jury when the answers are inconsistent.

As to the contention of Firestone that the appellate court decision in this case conflicts with prior decisions of the Supreme Court, it must be pointed out that Firestone has not cited any Supreme Court decisions which are directly, or even indirectly, in conflict. The only Supreme Court cases cited were *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), and *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963). It is true that both cases stand for the proposition that courts must search for a way to make the jury's answers to special interrogatories consistent. However, both cases dealt with situations in which the jury was released without ever being asked to engage in further deliberations to correct the ambiguity or inconsistency in the verdict. Neither case involves the fact situation in the case at bar, where a jury which was still empaneled was asked to deliberate further in order to cure an inconsistency.

Firestone got exactly what it complains not to have gotten, i.e., a right to trial by jury. Firestone is simply dissatisfied with the results and wants this court to say that the trial judge should have directed a verdict rather than allow the jury to engage in further deliberations. In essence, Firestone's argument is that by giving the problem to the jury to resolve, Firestone was denied a right to trial by jury. Firestone's argument is unsound and this Court is urged not to grant the writ of certiorari.

B. THE DECISION OF THE FIFTH CIRCUIT DOES NOT CONFLICT WITH OTHER CIRCUIT COURT DECISIONS

Firestone contends that *McCollum v. Stahl*, 579 F.2d 869 (4th Cir. 1978), conflicts with decisions in the Fifth Circuit and particularly the case under consideration. While it is true that the *McCollum* decision conflicts with cases decided in the Fifth Circuit in some respects, that fact alone should not persuade the Court to exercise its discretion to grant the writ. In *Stanton By Brooks v. Astra Pharmaceutical Products*, 718 F.2d 553 (3d Cir. 1983), the court approved the actions of the trial judge in asking the jury to engage in further deliberation to reconcile inconsistent answers. *Astra Pharmaceuticals* cited *McCollum v. Stahl* for the proposition that the court may not resubmit to a jury "questions propounded under Rule 49(a) of the Federal Rules of Civil Procedure. The Third Circuit observed that *McCollum v. Stahl* was the only case in existence which supported the plaintiff's position and further observed that *McCollum* relied on a Fifth Circuit decision which had been implicitly overruled in later Fifth Circuit decisions. In approving the actions of the trial judge the Third Circuit held:

> "Moreover, in purely pragmatic terms, it seems terribly inefficient not to obtain clarification from a still-empaneled jury of the meaning of its answers and verdict, especially when we consider that unclarified inconsistent answers often necessitate a retrial of the entire case. Accordingly, we hold that the district court did not abuse its discretion resubmitting the 'special questions' to the jury, whether those questions be deemed to have been propounded under Rule 49(a) or 49(b)." *Stanton By Brooks*, 718 F.2d at 575.

In the instant case, the trial judge adopted the common sense view of Federal Rule 49 and allowed the jury to clarify the inconsistent verdict. The fact that there exists a single case in the Fourth Circuit which does not support the actions of the trial judge in this case does not provide a sufficient reason for the issuance of the writ. The issue is one of relatively minor importance and it is respectfully submitted that every other circuit court in this nation would have reached a similar result. In fact, given the facts of this case, the Fourth Circuit Court of Appeals would probably refuse to follow the *McCollum v. Stahl* decision because there was no denial of Firestone's right to trial by jury.

Firestone's contention that the initial jury verdict was a decisive verdict for the defendant is without merit. In the first verdict the jury found no causation but that the product was defective, that Firestone was 10% at fault, and that the plaintiff's damages were $629,000. After the verdict was rendered, counsel for Firestone argued that it was a defense verdict while counsel for Richard argued that it was a plaintiff's verdict. The trial judge easily recognized the inconsistency and took the only fair and equitable approach to the problem. He resubmitted the interrogatories and asked the jury to please read the instructions on the verdict form. When the jury retired, they made no change in the interrogatories concerning defect, percentage of fault or damages. The only change was in the interrogatory concerning causation and that interrogatory was probably misunderstood by the jury from the very beginning. Thus, if the trial judge had granted Firestone's motion and not resubmitted the interrogatories to the jury, it would have been the task

of the appellate courts to somehow reconcile the inconsistency and the case would have ultimately been remanded for a new trial.

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CONCLUSION

The right of the litigants in this case to a trial by jury was saved from infringement by the decision of the trial court to resubmit inconsistent answers to interrogatories. Upon resubmission the jury clarified the inconsistency in its verdict, thereby relieving the parties from having to retry the case at a future date. The actions of the trial judge were authorized by the Federal Rules of Civil Procedure and by prior federal jurisprudence.

Respectfully submitted,

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